

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:

CARROLL MOORE
OPAL P. MOORE

In Proceedings
Under Chapter 7

Case No. 98-40652

Debtor(s).

OPINION

The trustee has filed an objection to the debtors' claim of exemption in a "possible preference avoidance action against GM Card for \$2,068.50 for payments to that creditor in the last 90 days prepetition."¹ The basis of the trustee's objection is that any such preference action "belongs to the estate, not to the debtors."

In response, the debtors concede they have no standing to file a preference action under 11 U.S.C. § 547, but assert that, if the trustee fails to act, they may, under 11 U.S.C. § 522 (h), file suit to recover this preference in order to gain the benefit of their exemption. The debtors argue that since they would then be entitled to exempt the amount so recovered, the trustee's objection should be overruled.

At hearing, the trustee indicated that she has no intention of filing a preference action to recover the GM Card payments since this amount "would go to the debtors" rather than benefitting the estate. She asserted, however, that even if the GM Card payments were recovered for the estate, the debtors would not be entitled to exempt them because the provisions of § 522 (g) and (h) allowing a debtor to exempt property recovered for the estate apply only to involuntary payments. The debtors, for their part, concede that the GM Card payments in question were voluntary.

Subsections 522 (g) through (i) govern a debtor's ability to exempt property that is recovered for the estate through the avoidance of transfers. Under § 522 (g) (1), the debtor may exempt property the trustee recovers "to the extent . . . the debtor could have exempted such property . . . had [it] not been transferred," if the transfer the trustee avoids was an involuntary transfer of property, see 11 U.S.C. § 522

¹The debtors' exemption is claimed under the Illinois NA "wild card" provision, which allows an exemption of \$2,000 per debtor in "any other [personal] property." See 735 Ill. Comp. Stat. 5/12-1001(b).

(g) (1) (A) , and the debtor did not conceal such property.² See 11 U.S.C. § 522 (g) (1) (B). In the event the trustee does not act to avoid an avoidable transfer of the debtor's property, § 522 (h) empowers the debtor to use the trustee's avoiding powers to create equity for the estate that may be claimed as exempt by the debtor.³ The debtor, however, may only avoid transfers of property that the debtor could have exempted under § 522 (g) (1) -- that is, only involuntary transfers of property that the debtor did not conceal.⁴ See In re Brennan, 208 B.R. 448, 451-52 (Bankr. S.D. Ill. 1997).

In this case, the debtors have conceded that the credit card payments to GM Card were voluntary. As such, the debtors would be unable to exempt these payments under § 522 (g) if the trustee filed suit to recover them as a preference under § 547. In addition, the debtors would have no ability to avoid the

² Section 522 (g) provides:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt . . . property that the trustee recovers under section . . . 550, [or] 551 . . . of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if -

(1) (A) such transfer was not a voluntary transfer of such Property by the debtor;
and

(B) the debtor did not conceal such property[.]

11 U.S.C. § 522 (g) (emphasis added). While § 522 (g) does not specifically refer to avoidance of preferential transfers under § 547, it incorporates the trustee's avoiding powers, including that of § 547, by reference to § 550. See 4 Collier on Bankruptcy, ¶ 522.12[1], at 522-97 (1998).

³ Section 522(h) provides:

The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under subsection (g) (1) of this section if the trustee had avoided such transfer, if

- (1) such transfer is avoidable by the trustee under section . . . 547 . . . of this title . . . ; and
- (2) the trustee does not attempt to avoid such transfer.

11 U.S.C. § 522 (h) (emphasis added).

⁴If a debtor successfully avoids a transfer under subsection (h), subsection 522 (i) allows the debtor to exempt the equity so recovered as though the trustee had avoided the transfer. See 11 U.S.C. § 522 (i) (1).

transfer themselves under § 522 (h) in order to claim the payments as exempt under § 522 (i), since the debtors' standing to proceed under § 522 (h) is dependent on their having the right to exempt the payments under § 522 (g) if the trustee had recovered them.

To date, neither the trustee nor the debtors have filed a preference action to recover the GM Card payments. Thus, the trustee's objection to the debtors' claim of exemption is somewhat premature, as any objection by the trustee that the payments may not be exempted under § 522 (g) because they were voluntary depends on the trustee actually recovering the preference amounts for the estate under § 547. In addition, if the debtors themselves filed a preference action under § 522 (h), the trustee's objection would be more appropriately raised as an objection to the debtors' standing to bring such action. In any event, the debtors would have no ability to exempt the GM Card payments. Therefore, in the interests of judicial economy, the Court will not defer ruling on the trustee's objection until a preference action is filed.

For the reasons stated, the Court finds that the debtors' claim of exemption in any GM Card payments recovered as a preference is invalid. The trustee's objection to this exemption will be SUSTAINED.

SEE WRITTEN ORDER.

ENTERED: July 21, 1998

/s/ KENNETH J. MEYERS
UNITED STATES BANKRUPTCY JUDGE